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BARCLAYS CAPITAL REAL ESTATE, INC.  
dba HOMEQ SERVICING,  
erroneously sued herein as HOMEQ SERVICING INC.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

JOHN ALLEN,  
Plaintiff,  
  
v.  
  
HOMEQ SERVICING INC.,  
Defendants.

**Case No.: 3:08-cv-01698 EMC  
NOTICE OF MOTION AND  
MOTION TO DISMISS  
COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

**[F.R.C.P. 12(b)(6)]**

**Hearing Date: May 14, 2008  
Hearing Time: 10:30 a.m.  
Place: Courtroom C, 15<sup>th</sup> Floor  
450 Golden Gate Avenue  
San Francisco, CA 94102**

**TO PLAINTIFFS AND THEIR COUNSEL OF RECORD HEREIN:**

PLEASE TAKE NOTICE that on May 14, 2008 at 10:30 a.m. or as soon thereafter as the matter may be heard in Courtroom C, 15<sup>th</sup> Floor of the above-entitled court located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant BARCLAYS CAPITAL REAL ESTATE, INC. dba HOMEQ

**MOTION TO DISMISS**

1 DATED: April 4, 2008

HOUSER & ALLISON  
A Professional Corporation

3  
4 By: By: /s/ Eric D. Houser  
Eric D. Houser  
Jeffrey S. Allison  
Attorneys for Defendant  
5 BARCLAYS CAPITAL REAL ESTATE, INC.  
6 dba HOMEQ SERVICING, erroneously sued  
7 herein as HOMEQ SERVICING INC.  
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MOTION TO DISMISS

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Plaintiff John Allen alleges two causes of action in his complaint against Defendant Barclays Capital Real Estate, Inc. dba Homeq Servicing ("Homeq"): negligent interference with prospective economic advantage, and violation of the Fair Credit Billing Act, USC § 1666(a)(B)(ii). Plaintiff's factual allegations are that Plaintiff sought to purchase a property in Sacramento, but was refused funding because of an incorrect loan payment delinquency on Plaintiff's credit report, allegedly reported by Homeq. Plaintiff further alleges that he has been unable to refinance his Oakland home because of the credit reporting, and that he would have rented his Oakland home to tenants had he been able to purchase his desired property in Sacramento.

There are several reasons the complaint should be dismissed. First, under California law the cause of action for negligent interference with prospective economic advantage requires an existing contract or economic relationship between plaintiff and a third party. Plaintiff's complaint merely alleges that he hoped to enter into an agreement to purchase a Sacramento property. Further, a defendant must know of the existence of the relationship, which Plaintiff does not and cannot allege.

1 Second, the Fair Credit Billing Act applies to situations where a creditor  
2 sends a statement to the borrower that is incorrect. If the borrower objects in a  
3 certain manner, the creditor must respond according to various requirements set  
4 forth in the Act. Here, there are no allegations Homeq ever sent an incorrect bill  
5 to Plaintiff. Rather, Plaintiff alleges that at some point he discovered that there  
6 was an allegedly incorrect credit reporting made by Homeq. The Fair Credit  
7 Billing Act simply does not apply to this situation.  
8

9  
10 Finally, Plaintiff relies upon a letter sent to him by Homeq to show that his  
11 loan was paid in full on August 30, 2006. However, the letter clearly states that  
12 the payment occurred August 31, 2006.<sup>1</sup> Even assuming Homeq reported Plaintiff  
13 as delinquent on his loan, as alleged, the mortgage loan agreement between  
14 Plaintiff and his lender provides that loan payments are due the first of each  
15 month. Loans are reported delinquent when payment is thirty days past due.  
16 Therefore, even assuming the alleged credit reporting took place, such reporting  
17 would be proper under the agreement with Plaintiff, and therefore Plaintiff's  
18 complaint fails to state a claim for relief against Homeq under any theory, and the  
19 complaint should be dismissed with prejudice.  
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26 <sup>1</sup> Documents attached to or relied upon and referenced in the complaint may be considered on a motion to dismiss  
27 without requiring the Court to convert the motion into a motion for summary judgment. See discussion in sections  
28 II and V, below.

## II. STANDARD FOR MOTION TO DISMISS

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is appropriate where a plaintiff fails to state a claim upon which relief can be granted. Dismissal is proper where the complaint fails to state either a “cognizable legal theory” or “sufficient facts alleged under a cognizable legal theory.” *Balistieri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing the complaint, the Court need not accept as true unwarranted deductions of fact, legal characterizations, argument, or unreasonable inferences.

Additionally, the Court may disregard allegations in a complaint if contradicted by facts established in documents exhibited to or referenced in the complaint, or documents that are central to a plaintiff’s claim even if not referenced. *See, During v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987); *Branch v. Tunnel*, 14 F.3d 449, 453-454 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (superseded by statute on other grounds); *Cortec Indus., Inc. v. Sum Holdings, L.P.*, 949 F.2d 42, 47 (2nd Cir. 1991). This prevents a plaintiff from deliberately omitting references to documents upon which their claims are based. *Parrino*, 146 F.3d at 706; *Cortec*, 949 F.2d at 47.

1 **III. THE COMPLAINT ITSELF ESTABLISHES THAT PLAINTIFF**  
2 **CANNOT ALLEGE SUFFICIENT FACTS UNDER THE CAUSE OF**  
3 **ACTION FOR NEGLIGENT INTERFERENCE WITH**  
4 **PROSPECTIVE ECONOMIC ADVANTAGE**

5  
6 Plaintiff fails to state a claim of relief for negligent interference with  
7  
8 prospective economic advantage. The allegations in Plaintiff's complaint  
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10 demonstrate that there are two flaws that prevent Plaintiff from stating a claim for  
11 relief based upon negligent interference with prospective economic advantage:  
12 first, Plaintiff was not in a contract or economic relationship with a third party; and  
13  
14 second, Plaintiff does not and cannot allege that Homeq knew of the existence of  
15 the relationship.

16 The tort alleged simply does not apply to the alleged set of circumstances.  
17  
18 "The tort of intentional or negligent interference with prospective economic  
19 advantage imposes liability for improper methods of disrupting or diverting the  
20 business relationship of another which fall outside the boundaries of fair  
21 competition." *Settimo Assoc. v. Environ Systems, Inc.*, 14 Cal. App. 4th 842, 845  
22 (1993).  
23

24  
25 Negligent interference with prospective economic advantage is established  
26 where a plaintiff demonstrates that: (1) an economic relationship existed between  
27 the plaintiff and a third party which contained a reasonably probable future  
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1 economic benefit or advantage to plaintiff; (2) the defendant knew of the existence  
2 of the relationship and was aware or should have been aware that if it did not act  
3 with due care its actions would interfere with this relationship and cause plaintiff  
4 to lose in whole or in part the probable future economic benefit or advantage of the  
5 relationship; (3) the defendant was negligent; and (4) such negligence caused  
6 damage to plaintiff in that the relationship was actually interfered with or  
7 disrupted and plaintiff lost in whole or in part the economic benefits or advantage  
8 reasonably expected from the relationship. *North American Chemical Co. v.*  
9 *Superior Court*, 59 Cal. App. 4th 764, 786 (1997); see also *Youst v. Longo*, 43 Cal.  
10 3d 64, 71 n.6 (1987).

11  
12 Here, the complaint alleges that Plaintiff “attempted to enter into an  
13 agreement with Step One Real Estate to purchase a home. . . .” See First Amended  
14 Complaint ¶ 5. The complaint does not allege any actual business or economic  
15 relationship, nor does it allege any economic relationship with the owner of the  
16 property; the complaint instead alleges some potential or desired agreement with a  
17 real estate company, presumably to then work with that company toward the  
18 purchase of Plaintiff’s desired property. California law does not permit such  
19 speculative, potential business relationships to form the basis of the tort of  
20 negligent interference with prospective economic advantage. As its name states,  
21 the tort is for the interference with the prospective *advantage*, not a prospective  
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1 relationship; the economic relationship must be in existence. Further, Plaintiff  
2 does not and cannot allege Homeq knew of his purported business relationship,  
3 which is an additional element of the tort on negligent interference with  
4 prospective economic advantage. Because Plaintiff fails on two specific elements  
5 of the cause of action alleged, the claim for negligent interference with prospective  
6 economic advantage must be dismissed with prejudice.  
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9 **IV. THE FAIR CREDIT BILLING ACT DOES NOT APPLY TO THIS**  
10 **CASE**  
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12 Plaintiff's cause of action for violation of the Fair Credit Billing Act fails to  
13 state a claim for relief against Homeq, and should be dismissed with prejudice.  
14 Plaintiff cites the Fair Credit Billing Act, 15 U.S.C. § 1666(a)(B)(ii) as the basis  
15 for his second claim against Homeq.  
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17  
18 But the very section cited clearly show that this Act does not apply to the  
19 alleged facts of the complaint. The Act states that "If a creditor, within sixty days  
20 after having transmitted to an obligor a statement of the obligor's account in  
21 connection with an extension of consumer credit," receives a written dispute from  
22 the consumer, the creditor must respond pursuant to various requirements. 15  
23 U.S.C. § 1666(a). Thus, the Act regulates the relationship between a creditor and  
24 an obligor when a dispute arises about a periodic statement sent by the creditor to  
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1 the obligor. If the obligor objects in writing within 60 days of the statement, the  
2 creditor is under certain obligations to respond.

3 Here, there are no allegations that Homeq sent Plaintiff any kind of  
4 statement. Rather, Plaintiff alleges that at some point in time he was denied  
5 financing, allegedly because Homeq had reported a prior delinquency on an earlier  
6 loan to Plaintiff. These circumstances do not come within the Fair Credit Billing  
7 Act cited by Plaintiff. Therefore, Plaintiff's claim for violation of the Fair Credit  
8 Billing Act should be dismissed with prejudice.

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12 **V. THE COMPLAINT AND OTHER DOCUMENTS THE COURT MAY**  
13 **REVIEW ON THIS MOTION ESTABLISH THAT EVEN**  
14 **ASSUMING NEGATIVE CREDIT REPORTING BY HOMEQ, SUCH**  
15 **NEGATIVE CREDIT REPORTING WAS ACCURATE**  
16

17 Plaintiff's complaint alleges that Homeq is liable because it incorrectly  
18 reported a loan delinquency regarding Plaintiff's loan. The complaint specifically  
19 relies on the October 9, 2007 letter from Homeq to Plaintiff "admit[ing] that the  
20 loan was paid in full on August 30, 2006." See First Amended Complaint ¶ 10.  
21

22 When ruling on a Rule 12(b)(6) motion, the Court may consider certain  
23 materials, including documents attached to the complaint, documents incorporated  
24 by reference in the complaint, and matters of judicial notice, without converting  
25 the motion to dismiss into a motion for summary judgment. *US v. Ritchie*, 342  
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1 F.3d 903, 908 (9th Cir. 2003). A district court ruling on a motion to dismiss may  
2 consider a document the authenticity of which is not contested, and upon which  
3 the plaintiff's case necessarily relies. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th  
4 Cir. 1998). "[A] document is not 'outside' the complaint if the complaint  
5 specifically refers to the document and if its authenticity is not questioned."  
6 *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (emphasis added).  
7

8 Documents whose contents are alleged in a complaint and whose authenticity is  
9 not attacked, even though not attached to the pleading, may be considered in ruling  
10 on a Rule 12(b)(6) motion to dismiss without the motion being converted into a  
11 motion for summary judgment. *Id.* at 454. "This rule serves a critical policy  
12 interest in preventing plaintiffs from surviving a Rule 12(b)(6) motion by  
13 deliberately omitting references to documents upon which their claims are based."  
14 *Zella v. E.W. Scripps Co.*, 529 F.Supp.2d 1124, 1131 (C.D. Cal. 2007).  
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19 Here, Plaintiffs' complaint specifically makes reference to and relies upon  
20 the October 9, 2007 letter from Homeq to Plaintiff John Allen stating that the loan  
21 was paid in full August 31, 2006. Plaintiff's allegations also arise out of the loan  
22 agreement. Homeq therefore submits the October 9, 2007 letter as **Exhibit 1** and  
23 the Adjustable Rate Note as **Exhibit 2** for the Court's review (these are attached to  
24 the Request of Judicial Notice filed concurrently with this motion).  
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1 Even though Plaintiff's complaint states that the October 9, 2007 letter says  
2 the loan was paid in full August 30, 2006, the document itself clearly states that  
3 the loan was paid in full August 31, 2006. *Compare* First Amended Complaint ¶  
4 11 *with* Exhibit 1 (October 9, 2007 letter). When such documents contradict facts  
5 stated in a plaintiff's complaint, the documents prevail. *Dent v. Cox*  
6 *Communications Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007) ("Like the  
7 district court, we must accept as true the allegations in the plaintiff's complaint,  
8 unless contradicted by the WH-58"). This corresponds with the "critical policy  
9 interest in preventing plaintiffs from surviving a Rule 12(b)(6) motion by  
10 deliberately omitting references to documents upon which their claims are based."  
11 *Zella*, 529 F.Supp.2d at 1131.

12 The Adjustable Rate Note clearly states that payments are due on the first of  
13 each month. *See* Exhibit 2 (Adjustable Rate Note, page 1, paragraph 3(A)).  
14 Therefore, even assuming Plaintiff's allegations that Homeq reported Plaintiff's  
15 loan delinquent to the credit bureaus, any such reporting would in fact be correct  
16 and factual, since payment August 31 for a payment due August 1 is 30 days late.  
17 Therefore Plaintiff's own complaint, taken together with the documents that the  
18 Court may review in ruling on this motion to dismiss under Rule 12(b)(6),  
19 demonstrates that there was no incorrect credit reporting as to Plaintiff. Plaintiff  
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1 therefore cannot allege sufficient facts under a cognizable legal theory against  
2 Homeq, and the complaint should be dismissed without prejudice.

3 **VI. CONCLUSION**

4  
5 Plaintiff's allegations in the complaint demonstrate that Plaintiff cannot  
6 state a claim for relief for negligent interference with prospective economic  
7 advantage since there was no existing economic relationship with a third party,  
8 and because the alleged facts demonstrate Homeq had no knowledge of the  
9 proposed economic relationship. Therefore, Plaintiff's claim for negligent  
10 interference with prospective economic advantage should be dismissed with  
11 prejudice.  
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15 Plaintiff's allegations also demonstrate that there is no possible relief for  
16 Plaintiff under the Fair Credit Billing Act, since the Act does not apply to the facts  
17 alleged in the complaint. Therefore, Plaintiff's claim as to the Fair Credit Billing  
18 Act should be dismissed with prejudice.  
19

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21 Finally, because the complaint, when reviewed with documents that are  
22 properly considered on a motion to dismiss, demonstrates that even assuming  
23 adverse credit reporting took place, such reporting was accurate, the entire  
24 complaint must be dismissed with prejudice.  
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1 SERVICING, erroneously sued herein as HOMEQ SERVICING INC. ("Homeq"),  
2 will and hereby does move the Court to dismiss Plaintiff's complaint with  
3 prejudice.  
4

5 The motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
6 for failure to state a claim for relief against Defendant. The motion will be based  
7 upon this notice of motion, the attached memorandum of points and authorities, all  
8 pleadings and documents filed herein, and any argument that may be presented or  
9 any matters of which judicial notice is requested or proper.  
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12  
13 DATED: April 4, 2008

HOUSER & ALLISON  
A Professional Corporation

14  
15  
16 By: By: /s/ Eric D. Houser

Eric D. Houser

Jeffrey S. Allison

Attorneys for Defendant

17  
18 BARCLAYS CAPITAL REAL ESTATE, INC.  
19 dba HOMEQ SERVICING, erroneously sued  
20 herein as HOMEQ SERVICING INC.  
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**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action. My business address is 9970 Research Drive, Irvine, California 92618.

On April 4, 2008, I served the following document described as:

**NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
THEREOF**


On the following interested parties in this action:

Shawn Ridgell  
RIDGELL & LAWLOR LLP  
2128 Broadway  
Oakland, CA 94612  
(510) 986-1300

**[X]** VIA MAIL -- By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on the date following ordinary business practices. I am readily familiar with my firm's business practice and collection and processing of mail with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Irvine, California, with postage thereon fully prepaid that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed on April 4, 2008, at Irvine, California.

  
Sherie L. Cleeré